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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

Charles J. Cannon and William L. Blagg,
Petitioners,

v.

Lawrence G. Williams,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a court of appeals has jurisdiction to hear an appeal, arising out of a sanctions hearing, from a lawyer who is the subject of a judicial rebuke embodied in explicit and published findings of misconduct, regardless of whether there is an accompanying monetary sanction or whether the rebuke is labeled a "reprimand."

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INTEREST OF THE *AMICUS CURIAE*

The American Bar Association ("ABA") respectfully supports the petitioners' request for review in the interest of promoting procedural uniformity in the regulation of lawyer conduct in the federal courts. The ABA is a voluntary national organization of the legal profession, with over 400,000 members representing every state and territory and the District of Columbia. The ABA's membership includes prosecutors, public defenders, lawyers in private practice, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer "associates" in allied fields.[1]

The ABA has a long standing interest in promoting uniformity of judicial decisions in general and of lawyer discipline in particular. Two of the ABA's constitutional purposes are "to promote throughout the nation ... the uniformity of legislation and of judicial decisions," and "to uphold the honor of the profession of law." American Bar Association Constitution and By-Laws §1.2. In furtherance of these goals, the ABA has appointed committees and commissions to evaluate and advise on the regulation of lawyer conduct. One of the stated purposes of this effort has been "to promote consistency in the imposition of

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[1] In accordance with Rule 37.6, the ABA hereby certifies that this *amicus curiae* brief is filed with the consent of both parties to this action. The ABA also certifies that no counsel for a party authored this brief in whole or part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief nor reviewed the brief prior to filing.

disciplinary sanctions for the same or similar offenses within and among jurisdictions."[2]

Specifically, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former Supreme Court Justice Tom C. Clark, released a report in 1970 finding that "inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems."[3] The "Clark Committee" went on to issue a number of recommendations for the promotion of uniformity in lawyer disciplinary enforcement through standardized practice and procedure.

The ABA has continued to develop and refine the standards suggested by the Clark Committee. For example, it established the ABA Joint Committee on Professional Discipline, composed of members of the ABA's Judicial Administration Division and the ABA's Standing Committee on Professional Discipline. "The task of the Joint Committee was to prepare standards for enforcement of discipline in the legal community." In 1979, the ABA published the Joint Committee's work, *Standards for Lawyer Discipline and Disability Proceedings*. Subsequently, the ABA adopted Model Rules For Lawyer Disciplinary Enforcement (1985) and Standards for Imposing Lawyer

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[2] ABA, Standards for Imposing Lawyer Sanctions, Standard 1.3.

[3] ABA, Special Comm. on Evaluation of Disciplinary Enforcement, *Problems and Recommendations In Disciplinary Enforcement* 167 (1970).

Sanctions (1986). The ABA has continued to study the functioning of lawyer discipline systems in the 1990's.[4]

Although the ABA's standards and model rules have been directed primarily at state disciplinary systems, the ABA's interest in promoting uniformity in the regulation of lawyer conduct extends to the federal courts as well. At the request of Chief Justice Burger and the Judicial Conference of the United States, the ABA adopted Model Federal Rules of Disciplinary Enforcement. The ABA also participated in the "Special Study Conference of Federal Rules Governing Lawyer Conduct" (June 18, 1996), convened by the Committee on Rules of Practice and Procedure of the United States Judicial Conference.[5]

The ABA's interest in seeing that a lawyer's right to appeal findings of misconduct is handled in a uniform manner throughout the federal courts of appeals, therefore, is consistent with the ABA's historical involvement in the development of lawyer disciplinary procedures in the United States.

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[4] *See, e.g., Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement* (ABA, 1992) (the "McKay Commission") (evaluating existing disciplinary systems, assessing the implementation of the recommendations of the Clark Committee and making independent recommendations for the regulation of attorney conduct). For a thorough historical overview of lawyer discipline in this country, *see* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Ethics 911 (1994).

[5] 12 Laws. Man. on Prof. Conduct (ABA/BNA) 11 d24.

REASONS FOR GRANTING THE PETITION

In recent years, the Supreme Court has granted certiorari to resolve disagreement over the appealability of orders in a variety of contexts.[6] It is not surprising that the Court granted review in these cases. Appealability issues are important. As the petitioners point out, "the right to appeal an adverse ruling stands as a 'fundamental element of procedural fairness as generally understood in this country.' ABA, Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. at 18 (1994)." Petition at 20. The Court likewise should grant certiorari in this case to resolve the present disagreement among the circuits over the appealability of published findings of lawyer misconduct.

In the ruling below, the First Circuit concluded that it lacked jurisdiction to review the "offending findings" because no sanction remained after the withdrawal of the monetary penalties. *In re Williams*, 156 F.3d 86, 90 (1st Cir. 1998). To reach this conclusion, the court distinguished the specifically re-published findings of misconduct, which the court held were not appealable, from an order imposing non-monetary "sanctions" in the form of a rebuke, which it said would be appealable. *Id.* at 91-92. The basis for the distinction, however, is purely formalistic; "offending

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[6] *E.g.*, *United States v. Jose*, 519 U.S. 554 (1996) (order conditionally enforcing summons final and appealable); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (abstention order appealable); *Johnson v. Jones*, 515 U.S. 304 (1995) (denial of summary judgment on qualified immunity defense not immediately appealable); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249 (1992) (district court order reviewing bankruptcy court decision appealable pursuant to 28 U.S.C. § 1292(b)); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (denial of motion to dismiss based on forum selection clause not immediately appealable).

findings" are appealable in the First Circuit if "expressly identified as a reprimand." *Id.* at 92.

The First Circuit's jurisdictional standard for reviewing findings of lawyer misconduct, which is based on the label attached to the order, conflicts with this Court's instruction that "[t]he label used by the District Court of course cannot control the order's appealability ..., any more than it could when a district court labeled a nonappealable interlocutory order as a 'final judgment.'" *Sullivan v. Finklestein*, 496 U.S. 617, 628 n.7 (1990). It also contrasts sharply with the approach taken by the Fifth Circuit in *Walker v. Mesquite, Tx.*, 129 F.3d 831 (5th Cir. 1997).

In *Walker*, the court held that "the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct." *Id.* at 832-833. The Federal Circuit and the Second Circuit similarly have allowed appeals from opinions that chastised a lawyer without imposing any monetary or other sanction. *Fromson v. Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir.1989); *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 373 (2d Cir. 1981).

In rejecting the approach that is now the law of the First Circuit, the Fifth Circuit noted that, as an appellate court, it has "a strong interest in hearing cases such as this because of [its] duty to assure that lawyers, as officers of the court, live up to their ethical responsibilities." *Id.* at 833 n.5. As observed in *Walker*, it is only natural that when a district court exercises its discretion to regulate lawyer conduct, "review of that exercise of power appropriately vests at the appellate level." *Id.* Otherwise, the district court's exercise

of power over the reputation of a lawyer would be exempt from appellate review.

The disagreement among the circuits on the question presented, however, runs even deeper than the conflict between the First Circuit and the Second, Fifth and Federal Circuits. The Seventh Circuit rejects the appealability of findings of misconduct unless accompanied by monetary sanctions regardless of the label attached to the order. *Clark Equipment Co. v. Lift Parts Mfg.*, 972 F.2d 817 (7th Cir. 1992); *Bolte v. The Home Insurance Co.*, 744 F.2d 572 (7th Cir. 1984). Thus, there is presently a three-way schism on the issue in the federal court system.

This conflict among the circuits will have a deleterious effect on the regulation of lawyer conduct in the federal courts. The conclusion of the Clark Committee is no less valid today than when that committee issued its report in 1970: "[I]nconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems."[7]

Although the problems caused by this lack of uniformity in federal procedure affect all lawyers who practice in the federal courts, they are especially acute for government and other lawyers who frequently appear in courts throughout the country. With the mobility of modern society, many lawyers enjoy a national practice. As recently observed by one commentator, a lawyer engaged in multi-forum litigation currently faces an arduous task when determining what standards and procedures govern his or her conduct. Katherine M. Lasher, Comment, *A Call For A Uniform Standard of Professional Responsibility In The Federal Court*

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[7] ABA, Special Comm. on Evaluation of Disciplinary Enforcement, *Problems and Recommendations In Disciplinary Enforcement* 167 (1970).

System, 66 U. Cin. L. Rev. 901 (1998). A uniform rule should govern the appealability of orders regulating lawyer conduct regardless of which federal court issues the order.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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